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The Law Commission

Working Paper No 56

Criminal Law

Conspiracy to Defraud

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This Working Paper, completed for publication on 24 May 1974, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

This Paper is published simultaneously with a Working Paper prepared by the Criminal Law Revision Committee on Section 16 of the Theft Act 1968. For a full understanding of the interlocking problems considered by the two bodies it will be of advantage to study the two papers together. We are, therefore, sending a copy of each paper to those we wish to consult.

The Law Commission will be grateful for comments before 1 January 1975.

All correspondence should be addressed to:

J. C. R. Fieldsend,
Law Commission,
Conquest House,
37/38 John Street,
Theobalds Road,
London WC1N 2BQ
(Tel: 01-242 0861, Ext.: 215)

who will co-ordinate comments on both Working Papers.

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Criminal Law

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THE LAW COMMISSION

WORKING PAPER NO. 56

CRIMINAL LAW

CONSPIRACY TO DEFRAUD

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THE LAW COMMISSION

WORKING PAPER NO.

CONSPIRACY TO DEFRAUD

INTRODUCTION

1. In Working Paper No. 50 the Working Party assisting the Law Commission in its examination of the General Principles of the Criminal Law examined the inchoate offences of Conspiracy, Attempt and Incitement. One of the provisional conclusions reached by the Working Party is that the offence of criminal conspiracy should be limited to cases where the prosecution can prove that the object of the agreement alleged against the accused was the commission of a criminal offence[1]. The Law Commission provisionally agree with this recommendation[2] which was also the conclusion reached by a sub-committee of the Criminal Law Revision Committee in a previous examination of the offence of conspiracy. The present law extends to agreements to commit any "unlawful act", and the uncertainty, as well as the width, of the resulting offence has been the subject of much criticism[3].

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1. Law Commission Working Paper No. 50, paras. 8-14.
2. Ibid., Law Commission Introduction, para. 3.
3. See, e.g., Director of Public Prosecutions v. Bhagwan [1972] A.C. 60, 79 per Lord Diplock: "The least systematic, the most irrational branch of English penal law, it [criminal conspiracy in the common law] still rests upon the legal fiction that the offence lies not in the overt acts themselves which are injurious to the common weal but in an inferred anterior agreement to commit them."

2. As a consequence of the proposal so to restrict conspiracy, it becomes necessary to inquire whether there are cases which, under the present law, can be caught only by a charge of conspiracy, but which ought in the future to be the subject of specific offences irrespective of whether they are committed by one or more persons. This inquiry was foreseen by the Working Party[4]. Accordingly we propose to issue a series of Working Papers to deal under various broad divisions with acts which, though not criminal if done by only one person, may found an offence if conspired to be done. These papers will consider whether the proposed restriction will leave not only technical gaps in the criminal law, but gaps which ought to be filled by the creation of new substantive offences. In paragraph 4 of the Law Commission Introduction to Working Paper No. 50 we stated that, whilst it was too early to make any certain forecast, our preliminary research seemed to show that it was mainly in the field of fraud that any serious lacunae might be left in the criminal law by the suggested limitation of conspiracy. Accordingly, in this first Working Paper in the series, we consider the offence of conspiracy to defraud.

3. In order to identify the lacunae which this restriction of the offence of conspiracy would leave, it is necessary to compare the conduct, which the law at present makes criminal by the provision of specific offences, with the conduct which becomes criminal only when it is the intended object of an agreement between two or more people. This task is somewhat lightened by the fact that, of the wide field we have to cover, one aspect, namely a substantial part of the law of obtaining a pecuniary advantage contrary to section 16 of the Theft Act 1968, is the subject of a Working Paper[5]

4. Working Paper No. 50, para. 32.

5. Criminal Law Revision Committee's Working Paper on Section 16 of the Theft Act 1968, published July 1974.

being issued by the Criminal Law Revision Committee contemporaneously with this Paper. The Committee (as for convenience we shall refer to it) were asked by the Home Secretary in 1972 to consider whether any changes were desirable in section 16 of the Theft Act having regard to the working of the section. As it was clear that there would be some overlap between their work and ours we discussed with them how best to divide our respective responsibilities. It has been agreed that they should confine their attention to section 16(2)(a) of the Theft Act, leaving us to consider section 16(2)(b) and (c). This arrangement relieves us of the task of considering the complications of section 16(2)(a) which has given rise to a number of sometimes conflicting decisions, culminating in D.P.P. v. Turner[6]. We shall assume that section 16(2)(a) will eventually be replaced by legislation which will make criminal the conduct which the Committee provisionally propose should be penalised in paragraph 25 of their Working Paper. To enable the reader to consider our proposals and those of the Committee together, and to see the relationship between the two sets of proposals, it has been arranged for our Paper to be published at the same time as that of the Committee on section 16, and we are sending a copy of the Committee's paper to all those to whom we send this paper.

4. The offence of conspiracy to defraud overlaps with the offence of conspiracy to commit a public fraud (which is also prosecuted as a conspiracy to commit a public mischief) and we therefore have to deal with this category of fraud also. This means that we have to deal with the whole field of dishonesty in the criminal law. Accordingly, we begin this paper with a brief outline of the ways in which dishonest conduct is at present caught by specific offences, or will be caught by the proposals of the Committee. In the next section we consider the extent to which the scope of the criminal law

6. [1973] 3 W.L.R. 352.

is widened by the existence of the offences of conspiracy with which we are here concerned, and we identify the gaps which a reform of the law on the lines indicated would leave, expressing a provisional view as to which of these ought to be filled and which can be safely ignored. In the third section we consider how these gaps ought to be filled. In so doing, we examine the whole question of how the law of fraud can be simplified and rationalised. This raises the question of whether the object can best be achieved by the creation of a number of specific offences, which may or may not involve deception, or by the creation of a generalised deception offence, or by a combination of these methods.

5. There has never been any generalised offence of criminal fraud in English law. In earlier years this omission was justified on the somewhat rigorous ground that the law should not protect a man against trickery[7]. In their Eighth Report on Theft and Related Offences[8], the Criminal Law Revision Committee considered the question whether or not a general offence of deception should be created and, as a compromise between different views expressed in the Committee, recommended the creation, in addition to specific offences, of a general offence which would carry a comparatively low maximum punishment[9]. This suggested offence was embodied in clause 12(3) of the draft Bill attached to the Report; the offence was to be committed by a person who "dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act". However, this clause was voted out in the Committee stage in the House of Lords and replaced with what, with later amendment, became in part section 16 of the Theft Act 1968. In the

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7. "We are not to indict one man for making a fool of another" Jones (1703) 1 Salt 379, 2 Ld. Raym. 1013 per Holt C.J.

8. (1966) Cmnd. 2977: see too the Committee's Working Paper paras. 3-9.

9. (1966) Cmnd. 2977, paras. 96-100.

debate in the House of Lords on this clause 12(3), the Lord Chancellor, Lord Gardiner said that -

> "any widening of the law going beyond the scope of the present Bill should be left to be considered as part of the comprehensive programme of modernisation and codification of the criminal law using the full resources of the Criminal Law Revision Committee, the Law Commission and the Home Office to which the Government are now committed. This is after all a Theft Bill, and it is limited to this field."[10]

6. The Theft Act 1968, whilst unifying and simplifying the offence of theft, retains the approach of creating (or re-enacting) particular offences in the area of deception[11]. In the same way, in our Report on Forgery[12] we dealt with this offence in isolation from other offences based on deception. In addition, in our Working Paper on Perjury[13] we made a provisional proposal for the replacement of the offences under the Perjury Act 1911, other than perjury, by two main offences each of which involved the telling of lies where there was a specific obligation to tell the truth, and these perjury-type offences may from one viewpoint be regarded as deception offences of a special nature.

7. In any examination of the criminal law which we make we have always to bear in mind the eventual aim of codification[14]. We must not, therefore, lose this opportunity of considering ways of unifying and simplifying as the Theft Act did in regard to theft, the law relating to dishonest conduct other than theft, conduct with which we deal in detail in the third section of this Paper.

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10. Hansard (House of Lords) 12 March 1968, Vol. 290, Col. 188.
11. Sects. 16, 17, 19 and 20.
12. (1973) Law Com. 55.
13. Working Paper No. 33.
14. Law Commission Second Programme of Law Reform, (Law Com. 14), Item XVIII.

SECTION I : OUTLINE OF THE PRESENT LAW

Introduction

8. We have said[15] that any examination of conspiracy to defraud must begin by considering what dishonest conduct is at present made criminal by specific offences. Whether or not the emphasis in the definition of an offence is laid upon the interest protected[16] or upon the conduct[17] made punishable, we think that we should make this examination by reference to the various interests, whether of a private or public nature, which are protected by criminal sanctions against fraud, deception and dishonesty, by specific offences. We must, however, emphasise that we are not attempting an exhaustive study of the law; our object is to do no more than identify the interests protected and the conduct made criminal in their protection.

Obtaining Property

9. The most obvious and the most frequent objective of dishonest conduct is obtaining someone else's property, whether by appropriation contrary to section 1 of the Theft Act 1968 or by deception contrary to section 15 of that Act; for the purposes of a consideration of conspiracy to defraud it is not necessary to consider the difficult question as to the extent to which these two offences overlap[18]. Both the offence of theft and the offence of obtaining property by deception require in the defendant an intent permanently to deprive another of the property; certain property is

15. See para. 3 above.

16. As in ss. 1 and 15 of the Theft Act 1968.

17. As in s. 19 of the Theft Act 1968.

18. R. v. Lawrence [1971] 1 Q.B. 373: see J.C. Smith, The Law of Theft (2nd ed., 1972), pp. 13 et seq.

excluded from theft[19] but not from the deception offence; and "deception" for the purposes of section 15 (and section 16)[20] of the Theft Act is defined in section 15(4). It appears to us that these are the three aspects of offences against property which are relevant to a study of conspiracy to defraud and we accordingly examine in turn -

(a) the intent permanently to deprive,
(b) the nature of the property, and
(c) deception.

(a) The intent permanently to deprive.

10. Subject to certain limited exceptions an intent to deprive another only temporarily of his property is insufficient to make a defendant liable under either section 1 or section 15 of the Theft Act 1968. The exceptions created by the offences of removing articles from places open to the public[21] and of taking a motor vehicle or other conveyance without authority[22] do not call for detailed consideration here. The Theft Act contains no comprehensive definition of the words "intention of permanently depriving" but "section 6 seeks to clarify their meaning in certain respects. Its object is in no wise to cut down the definition of 'theft' contained in section 1"[23]. In one respect, however, section 6 may be thought to extend permanent deprivation to what looks like a temporary one. The section provides that if a borrowing "is for a period and in circumstances making it equivalent to an outright taking...", the borrower may be regarded as having the intention of depriving

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19. Theft Act 1968, s. 4; see para. 12 below.
20. We deal in detail with s. 16 below; see paras. 15-20.
21. Theft Act 1968, s. 11.
22. Theft Act 1968, s. 12.
23. R. v. Warner (1970) 55 Cr. App. R. 93, 97 per Edmund Davies L.J.

the owner permanently. Professor Smith calls this provision "rather puzzling"[24] and in his book The Law of Theft gives it an extensive examination[25]. He concludes that the kind of borrowings which are intended to be covered are those "where the taker intends not to return the thing until the virtue has gone out of it", and instances such things as dry batteries and season tickets. Difficulties arise if the intention was not completely to exhaust the virtue of the article[26].

11. Subject to these exceptions English law does not make criminal the taking of another's property for a temporary purpose whether the property is obtained by deception, or surreptitiously without deception[27], so that if D takes P's chattel without authority or by deception, intending, having used it, to return it in the same condition in which he took it, he commits no offence.

(b) The nature of the property.

12. For the purposes of theft under section 1 and of obtaining property by deception under section 15 of the Theft Act 1968 property is defined as including "money and all other property, real or personal, including things in action and other intangible property", and therefore includes anything of economic value[28]. However, by later subsections of section 4

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24. Sect. 6 was not included in the draft Bill annexed to the Report of the Criminal Law Revision Committee.

25. Smith, The Law of Theft (2nd ed., 1972) pp. 50 et seq.

26. See para. 58 below.

27. This temporary taking of property is sometimes referred to as furtum usus. In Roman law furtum may well have extended to any unauthorised use of another's property. It certainly covered unauthorised use by a borrower or a depositee, and making a profit out of the illicit use of another's property. Buckland and McNair, Roman Law and Common Law (2nd ed., 1952), pp. 353-354.

28. Theft Act 1968, ss. 4(1) and 34(1); see generally, Smith, The Law of Theft (2nd ed., 1972), pp. 69-73.

certain property is excluded from the ambit of theft. These subsections read -

> "(2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say -
>
> (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or
>
> (b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or
>
> (c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.
>
> For purposes of this subsection "land" does not include incorporeal hereditaments; "tenancy" means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and "let" shall be construed accordingly.
>
> (3) A person who picks mushooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.
>
> For purposes of this subsection "mushroom" includes any fungus, and "plant" includes any shrub or tree.
>
> (4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcase of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned or another person is in course of reducing it into possession."

(c) Deception.

13. For the purposes of sections 15 and 16 of the Theft Act 1968 "deception" means "any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person"[29]. In their Eighth Report[30] the Criminal Law Revision Committee said that the word "deception" seemed to them, as it had done to the framers of the American Law Institute's Model Penal Code, "to have the advantage of directing attention to the effect that the offender deliberately produced on the mind of the person deceived" in contradistinction to the words "false pretence", which it replaced, which "makes one think of what exactly the offender did in order to deceive"[31]. The concept of deception in the Theft Act clearly requires that a person be deceived and does not comprehend the "deception" of a machine[32].

14. This definition is not without its difficulties and has been subjected to detailed examination and criticism by text book writers[33]; in particular, the exact bounds of deception by conduct and the extent to which implied statements, omission to correct a deception and mere silence can amount to a deception within the definition will, no doubt, have to be settled by judicial interpretation. The recent decision of the House of Lords in Director of Public Prosecutions v. Ray[34] suggests that the Courts will not be slow to include dishonest conduct within the definition. This case is considered in detail in paragraphs 19-20 of the Committee's Working Paper and there is no need for

29. Theft Act 1968, s. 15(4).

30. (1966) Cmnd. 2977.

31. Ibid., para. 87.

32. Davies v. Flackett [1972] Crim. L.R. 708; see J.C. Smith, "Some Comments on Deceiving a Machine", Law Society's Gazette, 28 June 1972, p. 576.

33. See Smith, Law of Theft (2nd ed. 1972), p. 73 et seq; Griew, The Theft Act 1968, p. 78 et seq.

34. [1973] 3 W.L.R. 359.

us to discuss it further, save to stress the width of dishonest conduct which the House was prepared to hold may amount to deception.

Theft Act 1968, Section 16.

15. Section 16 of the Theft Act 1968 provides as follows -

> "16.-(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
>
> (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where -
>
> (a) any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred; or
>
> (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
>
> (c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.
>
> (3) For purposes of this section "deception" has the same meaning as in section 15 of this Act."

Subsection (2)(a) is, as we have said, being considered by the Criminal Law Revision Committee, who take the view that, as now interpreted by the courts, the subsection in some respects penalises conduct which does not need to be made criminal while in other respects it requires clarification. We do no more than summarise these aspects in this Paper.

16. As now construed in D.P.P. v. Turner[35], section 16(2)(a) creates a far-reaching series of offences which cover a wide

35. [1973] 3 W.L.R. 352.

field. A person will contravene the provision if by any deception he dishonestly obtains (for himself or another) the result that any obligation to pay money, to which he is, or may become, liable, is reduced or, in whole or in part, evaded or deferred. This means that the subsection goes so far as to make it an offence to obtain by deception further time for the payment of a debt, where for example, a creditor is induced to delay suing for payment because a debtor has given him a cheque which in fact was worthless, or even where a rent collector is persuaded not to press for immediate payment by an untrue statement that the debtor is ill.

17. The Committee express the view that section 16(2)(a) as construed penalises conduct which Parliament did not intend to be within the scope of the criminal law, and that the provision is unsatisfactory in substance as well as in form[36]. They have found it helpful to start afresh, uninhibited by the structure of section 16, and to consider in what circumstances the use of deception should be criminal in relation to obligations to make payments.

18. The Committee propose[37] that the legislation to replace section 16(2)(a) should cover conduct which could, before the Theft Act, have been prosecuted under section 13(1) of the Debtors Act 1869 which penalised obtaining credit by deception. They propose for consideration a new offence which would penalise a person who by any deception dishonestly obtains for himself or another credit in respect of the payment of money. It would be made clear that credit is obtained from a person when, having been induced to agree to do something on a promise of payment from another, that person does work or incurs expense for the purpose. Credit would not include

36. Committee's Working Paper, paras. 22-24.

37. Ibid., para. 25.

credit in resepct of an existing debt or liability, the obtaining of further credit being made a separate offence with its own limitations[38]. As an alternative to the proposed offence of obtaining credit by deception, but as a means of arriving at substantially the same result, the Committee propose for consideration that it should be made an offence dishonestly to induce another, by deception as to a matter affecting the other's prospect of being paid, to do any act or allow any act to be done on an express or implied promise of payment[39].

19. The Committee's proposals, whichever of the alternatives is adopted, will cover -

(a) by deception dishonestly obtaining credit, including by deception dishonestly inducing another to do work or incur expense on a promise of payment,

(b) by deception dishonestly obtaining further credit with intent to avoid permanently the payment of either the whole or a part of a debt owed,

(c) dishonestly deceiving a creditor into thinking that an existing debt has in whole or in part been discharged, or that a liability which exists does not exist,

(d) fraudulently obtaining an allowance or a rebate which would reduce or extinguish a true liability[40].

---

38. Ibid., para. 35.
39. Ibid., para. 27.
40. Ibid., para. 35.

In addition, the Committee raise the question of whether there should be an offence of dishonestly going away without paying and not intending to pay, after receiving goods or services for which it is known payment should be made on the spot. They reluctantly conclude that such an offence may be needed[41]. They also seek views as to whether there is any need for the introduction of a general offence of issuing a cheque without a belief that it would be honoured[42].

Theft Act 1968, section 16(2)(b) and (c)

20. Paragraphs (b) and (c) of section 16(2) create, in effect, four separate fraud or deception offences in addition to the wide offence created by section 16(2)(a).

(a) Being allowed to borrow by way of overdraft, or obtaining improved terms.

If, in regard to being allowed to borrow by way of overdraft, section 16(2)(b) penalises only actually obtaining a loan by way of overdraft there would seem to be no necessity for a specific provision as this would be covered by the Criminal Law Revision Committee's proposals for the replacement of section 16(2)(a)[43]. It may be that section 16(2)(b) is aimed also at the mere obtaining of the facility and that the offence is committed even before an advance of money is actually obtained; this may already be covered by the present section 16(2)(a)[44], though it would probably not be covered under the Committee's proposals.

41. Ibid., para. 39.
42. Ibid., para. 41.
43. Ibid., para. 25
44. Smith and Hogan, Criminal Law (3rd ed., 1973), p. 453.

(b) Being allowed to take out an insurance policy or annuity contract, or obtaining improved terms.

It was probably thought that these contracts, being uberrimae fidei, that is requiring full disclosure of all material facts, needed special protection.

(c) Being given the opportunity to earn remuneration or greater remuneration.

This would not be an offence under section 15 of the Theft Act because the obtaining of the salary or wages is too remote from the deception[45].

(d) Being given the opportunity to win money by betting.

Before the Act no offence was committed where D induced a bookmaker to take bets by false pretences. If the horse won, the money was paid because D had backed a winning horse not because he made a false pretence[46]. This case is now specifically covered by section 16(2)(c).

Theft Act 1968, sections 17, 19 and 20

21. In sections 17, 19 and 20 the Theft Act re-enacted the previously extisting offences of false accounting, false statements by company directors, and the suppression etc. of documents. Those are offences bearing some similarity to forgery in that they are usually offence committed preparatory to some other

45. R. v. Lewis (1922) Somerset Assizes, referred to in Russell on Crime (12th ed.), p. 1186; cf. R. v. Potger (1970) 55 Cr. App. R. 42.

46. R. v. Clucas [1949] 2 K.B. 226.

offences of dishonesty. It is noticeable that under section 19 an intention to deceive is a sufficient criminal intention, but it must be an intention to deceive members or creditors of a company or association.

Gaming Act 1845, section 17

22. Section 17 of the Gaming Act 1845 provides that -

> "Every person who shall, by fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other ... any sum of money or valuable thing ..."

shall be guilty of an offence. There is no difficulty in applying this section to cases where the dishonest person is actually participating in the game but where he is wagering on the result greater difficulty may arise. In R. v. Leon[47] and R. v. Clucas and O'Rourke[48] the defendants obtained betting facilities by false pretences as to their abilities to meet losses if incurred, and were convicted on the basis that they had obtained the winnings of successful bets for the purposes of section 17. But these decisions have been rigorously criticised[49] on the ground that the money was won because the horse won and not by any "fraud or unlawful device or ill practice". Other difficulties arise in cases where, for example, footballers agree to "throw" a match upon the outcome of which they have wagered. The fraud etc., in this case would seem to be practised in the match itself. In the first part of the section which deals with fraud

47. [1945] K.B. 136.

48. [1959] 1 All E.R. 438.

49. Russell on Crime (12th ed.), Vol. II, pp. 1198-2000. The situation is, of course, now met specifically by s. 16(2)(c) of the Theft Act 1968.

in playing at cards etc., it would seem that the words "other game", following as they do "cards, dice, tables", are limited by the ejusdem generis rule, particularly as "any game, sport, pastime or exercise" are specifically mentioned as a subject of wagering at the end of the section. Secondly, how does a person win money "in playing" a game? It is at least arguable that this means by playing to get a prize, or to win a bet with an opponent, and not by a bet with a third party; to win the latter is more aptly described by the expression "in wagering". But if the fraud etc., is charged as being "in wagering" the difficulty is, as in the horse-racing case, that the money is won not so much because of any deceit in wagering, but because of the loss of the match.

Other offences of dishonesty

23. There is a large number of criminal offences created for the protection of special interests such as those of creditors, investors, depositors and consumers[50]. Some do not even require an element of dishonesty[51]. It is not thought that any of these offences calls for consideration either in an examination of conspiracy to defraud or in an exercise aimed at rationalising and simplifying the law relating to fraud and deception. Such offences are aimed at special situations and come largely outside any consideration of general principles.

Perjury Act 1911

24. The Perjury Act 1911 provides criminal sanctions for perjury in judicial proceedings and for the making of false statements in certain other contexts. This Paper is not concerned with perjury in judicial proceedings but the other

50. Under Debtors Act 1869; Bankruptcy Act 1914; Companies Act 1948; Trade Descriptions Act 1968.

51. E.g. Prevention of Fraud (Investments) Act 1958, s. 13 and Protection of Depositors Act 1963, ss. 1 and 15.

offences do have a bearing upon the subject. Section 2 penalises the making of a false statement on oath otherwise than in judicial proceedings. Sections 3 and 4 relate to false statements in relation to births, deaths and marriages. Section 5 relates to false statements not on oath in statutory declarations, in documents etc. authorised or required by any public general Act of Parliament and in oral declarations or answers required by, under or in pursuance of general Acts. Section 6 relates to false declarations, certificates or representations made to obtain registration under any Act as a person qualified to practice a vocation. These offences are not, or not necessarily, linked to the obtaining of an economic advantage, and there is a multitude of statutory offences relating to the making of false statements, mostly to obtain advantages (though not always economic advantages), almost all to be found in legislation enacted after 1911[52].

Other "perjury type" offences

25. In our Working Paper on Perjury[53] we made the provisional proposal that all the offences created by Sections 2, 5 and 6 of the Perjury Act 1911 could be replaced by an offence which would penalise the making of a false statement -

(a) on oath otherwise than in judicial proceedings,

(b) in a statutory declaration,

(c) in any oral or written statement required or authorised by, under, or in pursuance of an Act of Parliament.

We also proposed a specific offence to cover false statements in relation to births, death and marriages now met by

52. See Working Paper No. 33, Appendix, which lists 68 such offences as examples.

53. Working Paper No. 33, para. 15.

section 3 and 4. All these would be, essentially, deception offences aimed at protecting the proper and efficient operation of legislative schemes provided by Parliament, and their commission would not depend upon any intent to cause prejudice or obtain an advantage. It was hoped that the widening of the terms, under which the offences in section 5(b) and (c)[54] are now covered, would allow many of the statutory offences referred to in footnote 52 to be repealed, and would obviate the necessity for creating further similar offences.

Forgery

26. The Forgery Act 1913 creates two main classes of offences of making and using forged documents differentiated by the mental element required for their commission. The first main class requires an intent to defraud or deceive; the second requires an intent to defraud. The former class covers, broadly, documents bearing public seals, records of births, marriages and deaths and other "public documents" and it will be seen that an intent to deceive is all that is required to render their making or using a criminal offence. The latter class covers documents generally of a "private" character (but including bank notes) and a mere intent to deceive is insufficient to render the making or using of such a document, when forged, criminal.

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54. These paragraphs penalise a person who knowingly and wilfully makes a false statement in -

(a) any document which he is authorised or required to make by any public general Act of Parliament; or

(b) any oral declaration which he is required to make by, under or in pursuance of any public general Act of Parliament.

27. The intent required by the Forgery Act 1913 in order to render the forgery of a "private" document criminal is an intent to defraud. The required intention to defraud in forgery has been the subject of much judicial consideration culminating in the case of Welham v. Director of Public Prosecutions[55]. We summarised the effect of these decisions in paragraphs 30 and 31 of our Report on Forgery[56] and it is convenient to repeat these paragraphs here -

> 30. The present law requires that there must be an intent to defraud in relation to documents of a private character and an intent to defraud or deceive in relation to documents of a public character. It is easy to state that the two expressions connote different states of mind, but it is far less easy to determine precisely where the distinction lies. That there is a distinction is clear from such cases as Welham v. D.P.P.[46] and R. v. Moon[47]. An intent to deceive is little more than an intent to use a false document as genuine, whereas an intent to defraud is an intent to induce another to act (to his disadvantage) in a way he would not otherwise have done[48]. The distinction is well illustrated by the cases of R. v. Hodgson[49] and R. v. Geach[50]. In R. v. Hodgson the defendant altered a diploma of the Royal College of Surgeons to make it appear that it had been granted to him. It was not shown that he made the alteration for any purpose other than to induce

46. [1961] A.C. 103.
47. [1967] 1 W.L.R. 1536.
48. Re London & Globe Finance Corporation Ltd. [1903] 1 Ch. 728, 732. "To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury... to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."
49. (1856) Dears & B. 3.
50. (1840) 9 C. & P. 499.

55. [1961] A.C. 103.
56. (1973) Law Com. 55.

others to think better of him because he was a surgeon, and it was held that he had no intent to defraud. If, however, the document had been a public document he would under the present law, have been guilty of forgery as he did intend to deceive. In R. v. Geach the defendant falsely made a signature signifying an acceptance of a bill of exchange and, when charged with uttering a forgery, argued that he had no intent to defraud as he had always intended to meet the bill himself and had in fact paid the banker who had honoured it. It was held that the defendant did have an intent to defraud because he intended to put the banker in a worse position than he would have been in had he not been deceived by the false signature, as he had been induced to advance money on a bill without the usual security of an acceptor.

31. The essential facts in Welham v. D.P.P.[51] were that the accused uttered a forged hire-purchase proposal from and a forged hire-purchase agreement. The evidence established that he knew that these were forged documents but that he had no intention of defrauding the finance company to whom they were delivered. It was accepted that the accused believed that the finance company was prepared to advance money to a motor dealer provided the transaction was under the cover of a hire-purchase agreement, the subterfuge being necessary to avoid certain statutory restrictions on borrowing, and the limits imposed by the finance company's memorandum and articles of association. The accused admitted that he intended to deceive the relevant authority who might inspect the records to see that the credit restrictions were being observed and whose duty it was to prevent their contravention. This intent was held to be an "intent to defraud" within the meaning of those words in relevant sections of the Forgery Act 1913. It, therefore, is now clear, following the decision in Welham, that in forgery an intent to defraud may exist without an intent to inflict economic prejudice or to make a financial gain, and an analysis of the earlier cases shows that Welham did no more than restate the existing law in terms which permit of no doubt. It is true that the headnote and Lord Radcliffe's speech limit an intent to defraud to those cases where there is an intent to deceive "a person responsible for a public duty into doing something that he would not have done but for the deceit or not doing something that but for it he would have done", and that on the facts

51. [1961] A.C. 103.

of the case that was as far as it was necessary to go. However, Lord Denning frames a wider proposition in these terms -

> "Put shortly 'with intent to defraud' means 'with intent to practise a fraud' on someone or other. If need not be anyone in particular. Someone in general will suffice. In anyone may be prejudiced in any way by the fraud, that is enough."

Cases such as R. v. Toshack[52], R. v. Sharman[53], R. v. Moah[54], R. v. Bassey[55] and R. v. Potter[56] were all decided without decisive reference to the intent to cause any economic loss, but none of these cases, nor any decided English case puts any precise limitation upon the nature of the disadvantage which must be intended.

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52. (1849) 4 Cox C.C. 38 (forging a letter testifying to a period of meritorious service to support an application to Trinity House for a certificate of fitness to act as ship's master).
53. (1854) 6 Cox C.C. 312 (forging a testimonial to support an application for appointment as a schoolmaster at a parochial school).
54. (1858) 7 Cox C.C. 503 (forging a testimonial to support an application for appointment as a police constable).
55. (1931) 22 Cr. App. Rep. 160 (forging papers to obtain admission to an Inn of Court).
56. [1958] 2 All E.R. 51 (forging a certificate of competence to drive a vehicle).

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28. It will be seen at once that the approach of the present law to the definition of the intent to defraud required in forgery is different from that adopted in most of the other offences so far considered. The intent to defraud may exist without an intent to inflict economic prejudice or to make a financial gain, and in that regard the intent required is no different from that required for the offence of conspiracy to defraud[57].

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57. R. v. Withers & Ors. [1974] 2 W.L.R. 26.

29. Like perjury, forgery was included in our Second Programme as a subject for consideration by the Law Commission. We published Working Papers[58] on both these subjects and, in the case of forgery, we followed our consultation on the subject with a Report[59] with draft clauses aimed at simplifying and codifying the law. In that Report we naturally considered the representations which had been made to us recommending that forgery should no longer be an offence, and that the conduct now constituting the offence of uttering a forgery should and could be subsumed under the general law of fraud. Some members of the Society of Public Teachers of Law suggested that there was no reason to maintain any distinction between a document telling a lie about its authenticity and a document expressing an untrue statement. We stated their argument thus -

> "They would abolish the distinction between a document telling a lie about its authenticity and a document expressing an untrue statement. If this were done, they contend that any social danger inherent in the making of such document could be adequately met by penalising only the use of the document to obtain some pecuniary or other advantage. The law of attempt would deal with the unsuccessful use of the document. To achieve this result, they appreciate that a new offence would have to be created to cover the case where the false document is used to affect another in his duty without seeking a pecuniary advantage for the user of the document or another."60

30. In subsequent paragraphs of the Report[61] we gave our reasons for reaching the conclusion that forgery should be retained as a separate criminal offence. The main reason we gave was the need in modern society to rely on the authenticity of documents as authority for the truth of the statements which they contain, which makes it desirable to penalise the

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58. Working Paper No. 26 (Forgery) and Working Paper No. 33 (Perjury).

59. (1973) Law Com. 55.

60. Ibid., para. 13.

61. Ibid., paras. 14-16.

making of false documents which give spurious authenticity to the information in them. This obviates having to delay action against a wrongdoer until the document is used, when it may be too late to prevent the harm being done, and allows the law to intervene even before the stage of attempt is reached. A using offence was included in the draft Bill appended to the Report[62] because it was thought right to penalise the use of that which it was an offence to make. Because the mental element required for forgery is in some respects wider than that required under the offences of dishonesty which we have already considered in this Paper, it would follow that, without the provision of a using offence with the same mental element as that required for the recommended offence of forgery, there would be some instances where the using would not be an offence. We recognised, however, that, if in the future a sufficiently wide deception offence were to be created there might be no need to retain a separate offence of using a forgery[63]. The inter-relation between the offences recommended in our Forgery Report and any new offences will obviously require careful consideration. In particular, attention will have to be given to whether in a wider field than forgery the proposed intent to cause prejudice should be adopted.

SECTION II: IDENTIFICATION OF THE GAPS LEFT BY A RESTRICTION OF CONSPIRACY

Introduction

31. In Welham v. D.P.P.[64] Lord Radcliffe said, in upholding the decision of the Court of Appeal, that the view there taken was in accordance with what was said by Lord Tucker in Board of Trade v. Owen[65], and added that the fuller argument in the case before him had not led him to think that it needed any

62. Ibid., Appendix, clause 3.
63. Ibid., para. 46.
64. [1961] A.C. 103, 129.
65. [1957] A.C. 602, 622.

qualification. In Board of Trade v. Owen the House of Lords had had to consider whether an agreement to deceive the German authorities into granting an export licence was a criminal conspiracy to defraud; in the event the actual decision in the case turned upon a question of jurisdiction but the passage from Lord Tucker's speech which, although obiter, was expressly approved in Welham's case, read as follows -

> "Whether or not the matters alleged in count 3 and the evidence adduced in support thereof are correctly described as a conspiracy to defraud, I have no doubt that they disclose a conspiracy which would be indictable here if the acts designed to be done and the object to be achieved were in this country. It is a conspiracy by unlawful means, viz. by making false representations known to be false, to procure from a department of government an export licence which, but for the representations, could not have been lawfully obtained. It is an example of a conspiracy by unlawful means to achieve an object in itself lawful, i.e. the issue of an export licence. If, however, a conspiracy of this nature is aptly included in the wide category of conspiracies known as conspiracies to cheat and defraud and it is necessary to prove that the acts designed to be done or the object to be achieved will result in some person acting to his detriment, I feel little doubt that a governmental department so acts if it issues a licence which enables something to be done which the government is charged with the duty to prevent."[66]

Law Commission Report on Forgery

32. From these citations it is, we think, clear that in relation to prejudice the intent to defraud bears the same meaning in conspiracy to defraud as it does in forgery. In our Report on Forgery we in effect re-stated in a codified form the result of these decisions (subject to a possible slight modification to overrule the effect of R. v. Parker[67]). We set

66. [1957] A.C. 602, 622.

67. (1910) 74 J.P. 208.

out here the paragraphs in which we dealt with this matter -

Re-statement of the present law

32. It is obviously not satisfactory in a codification of the law of forgery merely to retain the phrase "with intent to defraud" leaving its meaning to be ascertained from the many cases on the earlier statutes. This is particularly so when the cases, while not putting any precise limitation upon the nature of the disadvantage which must be intended, have not limited the disadvantage to economic loss, a limitation which the ordinary person might think follows from such a word as defraud. The essential feature of the mental element in forgery is an intention to induce another to accept the forged instrument as genuine and, by reason of that, to do or refrain from doing some act. Indeed in the Australian and Canadian Codes[57] the required intention is defined in this way. Such a definition, however, creates a very wide offence which would penalise such practical jokes as the making of a forged invitation to a social function made with no more wicked intent than of raising a laugh at another's expense by inducing him to act upon the invitation. We do not think that such conduct should be within a serious offence such as forgery. Accordingly we have sought for a formula to limit the width of the offence.

33. We explored many possibilities in a search for a way of defining the intent required and at one stage we thought that the right result could be obtained simply by providing that there should be an intent to induce another to act upon the forged instrument to his or another's prejudice. "Prejudice", however, is not a word which in the field of criminal law has acquired a precise meaning, and we feared that the use of this word undefined might lead to a series of decisions on the meaning to be given to it, thus defeating one of our objects in restating and clarifying the law. We turned, therefore, to a consideration of the main

57. Australian Commonwealth Crimes Act (1914-1966), s. 63 and Canadian Criminal Code (1954-1966), s. 309(1)(b).

fields in which forgery most commonly occurs, with a view to determining what needed to be covered by the offence. Forgery most commonly occurs in connection with obtaining money or other property at the expense of another, and we decided to put in the forefront of our definition the intention to induce another to suffer a loss of money or other property, whether permanently or only temporarily - loss being defined, as it is in the Theft Act 1968, to include not getting what one might get, as well as parting with what one has. Such a definition would not cover an intention to induce another to give an opportunity to earn remuneration, for the remuneration is paid in return for the work done. Nevertheless the forging of any instrument, such as a testimonial or certificate evidencing a qualification, in order to obtain employment should be covered. Indeed, this is the present law and our consultations do not suggest that it should be changed. But even a definition of an intention to cause a loss cast in these terms would be insufficient to cover the variety of circumstances in which the making of a false instrument is at present an offence and, in our view, should continue to be penalised. The making of a forged security pass to obtain access to a building, the forging of a certificate of competency to drive a vehicle in order to obtain a driving licence, or the forging of documents in the circumstances of a case such as Welham would not be within the intention to cause a loss to another. In each of these cases the forgery is intended to be used to induce another to perform a duty which he has in a way in which he would not have performed it had he not accepted the instrument as genuine, and should also be covered. Again, this is, in effect, the present law and our consultations do not suggest that it should be changed.

34. There is some authority[58] that it is forgery under the present law to make a false document to obtain payment of what is due,

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58. R. v. Parker (1910) 74 J.P. 208, in which a naval rating was convicted for having forged a letter from the Admiralty urging a fellow rating who owed him money to pay the debt: and R. v. Smith (1919) 14 Cr. App. Rep. 101.

unless the maker of the document also believed that he was entitled to make the false document. It may be that such a fact situation as arose in R. v. Parker would not fall within the part of our definition of prejudice which relates to a person suffering a loss; the debtor in paying what is due by him does not suffer a loss. However, it could be said that he has performed his duty to repay in a way in which he would not have performed it had he not accepted the instrument as genuine; but in our view it should not be forgery to make a false instrument to induce another to do what he is obliged to do or refrain from doing what he is not entitled to do. Cases where the forged instrument contained menaces would be caught in appropriate cases by section 21 of the Theft Act 1968 as blackmail if the instrument were used. That we think is the stage at which such an offence should be prosecuted, the determining factor being whether the person believed that the use of the menaces was a proper means of reinforcing the demand.

35. We have considered whether this definition of the mental element should be further refined by the addition of the word "dishonestly". This word is used in sections 15-16 of the Theft Act 1968 in penalising a person who by any deception obtains property belonging to another or a pecuniary advantage. Although the Act does not define the word, the effect of section 2 is to exclude from the operation of those sections a person who uses deception to obtain property, or a pecuniary advantage, to which he believes he is entitled. In forgery, however, as we propose that it should be defined, we are dealing with the more specific concept of intention to prejudice by the use of a false instrument as if it were genuine, and we do not think that the addition of a further qualification of "dishonestly" is either necessary or helpful. If a person makes a false instrument intending that it be used as genuine to prejudice another by inducing him to act contrary to his duty it is irrelevant that that person may genuinely believe that he is entitled to what he is trying to obtain. However firmly he may believe, for example, that he is entitled to a driving licence,

he intends to induce another to act contrary to his duty if he intends to induce him to issue such a licence against a false certificate of competence to drive a vehicle, as it is the issuing officer's duty to issue a licence only against the presentation of a valid certificate of competence.

36. It will be appreciated that an essential feature of the-mental element, as we propose that it should be defined, is an intent that the false instrument be used to induce another to accept it as genuine, and by reason of that to do or refrain from doing some act. This postulates the use of an instrument to deceive a person, and does not appropriately meet the case where the intention is to use a false instrument to cause a machine to operate[59]. The increasing use of more sophisticated machines has led us to include within "instruments" capable of being forged the discs, tapes and other devices mentioned in paragraph 25, which may cause machines into which they are fed to respond to the information or instructions upon them, and, of course, there are machines which are designed to respond to an instrument in writing. It is necessary, therefore, to make provision to cover in such cases the intention to cause a machine to respond to a false instrument as if it were a genuine instrument. There also has to be provision for treating the act or omission intended to flow from the machine responding to the instrument as an act or omission to a person's prejudice[60].

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59. Davies v. Flackett [1972] Crim. L.R. 708, though not a case of causing a machine to operate on a false instrument, raised the question of whether a machine can be "deceived".

60. App. A clause 6(4).

33. The draft clauses accompanying the Report read as follows -

"1. It is the offence of forgery for any person to make a false instrument, intending that he or another (whether a particular

person or not) will use it with the intention of inducing somebody (again, whether a particular person or not) to accept it as genuine, and, by reason of that, to do or refrain from doing some act to his own or any other's prejudice.

6. (3) For the purposes of this Part of this Act, an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs -

(a) will result in a loss by that person in money or other property, whether a permanent loss or a temporary one only, and with -

(i) "property" meaning for this purpose real and personal property, including things in action and other intangible property, and

(ii) "loss" including for this purpose a loss by not getting what he might get as well as a loss by parting with what he has, or

(b) will take the form of giving to somebody an opportunity to earn from him remuneration, or greater remuneration, in some office, or

(c) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with the performance by him of any duty:

Provided that there shall be disregarded for the said purposes any act which a person has an enforceable duty to do, and any omission to do an act which a person is not entitled to do."

34. It follows from what we have said that in restating in these terms the intention to induce another to act to his or another's prejudice required for the offence of forgery, we have also stated the intention to induce another to act to his or another's prejudice required for the offence of conspiracy to defraud. In so doing we have identified a main gap which would appear if conspiracy were to be restricted in the way we

have suggested[68]. Except perhaps in some special cases where it might amount to a public mischief[69] to deceive a person into acting contrary to his duty, it is not, in the absence of conspiracy, an offence to deceive a person to act unless it is to his economic prejudice. There can, however, be a conspiracy to defraud where an official is deceived into granting an export licence which but for the deception he would not have granted[70]; where a pottery manufacturer is deceived into supplying pottery for the home market which regulations prescribed was for export only[71]; or where a profession or institution is deceived into accepting an unqualified person as a member[72]. In each of these cases what we might call "the prejudice formula" (as set out in the previous paragraph) was applied, it being sufficient prejudice to found a charge of conspiracy to defraud that a person was deceived into acting contrary to what would have been his duty had he not been deceived. A general deception offence based as far as the mental element is concerned upon our forgery proposals, and thus incorporating the prejudice formula might, however, be unacceptably wide. Our immediate task, therefore, must be to compare this wide ambit of conspiracy to defraud with the offences outlined in the previous section of this Paper and attempt to identify the unacceptable gaps which would be left were conspiracy to be restricted as we propose that it should be. In doing this we follow substantially the same order as that adopted in Section I.

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68. Another main gap with which we deal in paras. 46-47 arises where there is prejudice but no deception or inducement. R. v. Scott [1974] 2 All E.R. 204 decides that conspiracy to defraud does not necessarily involve an agreement to deceive. Leave to appeal to the House of Lords has been granted.

69. R. v. Manley [1933] 1 K.B. 529.

70. Board of Trade v. Owen [1957] A.C. 602, and see para. 70 below.

71. R. v. Newland [1954] 1 Q.B. 158, and see para. 54 below.

72. R. v. Bassey (1931) 22 Cr. App. R. 160, and see para. 53 below.

Obtaining property

(a) Temporary deprivation

35. Dicta in Welham v. D.P.P.[73] suggest that an intention by the use of a forged document to deceive someone into parting temporarily with his property would amount to an intention to defraud for the purposes of the Forgery Act 1913; we have no doubt that such an intention would suffice equally for conspiracy to defraud[74]. Even without there being any deception it may be that an agreement to take property from someone against his will, whether by stealth or force though intending to return it later would be a conspiracy offence - perhaps a conspiracy to defraud[75]. A similar type of case is exemplified by R. v. Button[76] in which servants of a dyer were convicted of conspiracy in using their master's vats and dyes for private work of their own. If they had used only the equipment, without stealing the dyes, they would apparently still have been convicted. These then are instances of conduct which, if now done in combination, would probably be criminal but which, without some added criminal ingredient, would no longer be an offence if our conspiracy proposals were implemented.

(b) Property

36. An agreement to appropriate land or any of the things mentioned in section 4(3) and (4) of the Theft Act 1968[77] might, we think, amount to a criminal conspiracy. This, then, is another gap in the law which would be left. To conspire to trespass for the purpose of appropriating any of those

73. [1961] A.C. 103 per Lord Radcliffe at 128; per Lord Denning at 133.

74. R. v. Sinclair [1968] 1 W.L.R. 1246 per James J. at 1250: "to act with deliberate dishonesty to the prejudice of another person's proprietary rights".

75. Smith and Hogan, Criminal Law (3rd ed., 1973), p. 184; R. v. Sinclair [1968] 1 W.L.R. 1246.

76. (1848) 3 Cox C.C. 229.

77. See para. 12 above for the text of this section.

things would also now be an offence[78]. The effect of our provisional proposals in the paper we have issued dealing with Offences of Entering and Remaining on Property[79], would be that a conspiracy to trespass for any of these purposes would not of itself constitute an offence.

Obtaining a pecuniary advantage

37. So far as the obtaining of a pecuniary advantage falls within the scope of section 16(2)(a) of the Theft Act, the relevant law has been reviewed by the Criminal Law Revision Committee in their Working Paper. We have summarised the Committee's proposals in paragraphs 18 and 19 above. If the Committee's proposals are adopted, we do not think that the limitation of the offence of conspiracy will leave any gaps which will need to be filled by the creation of further offences in the area with which section 16(2)(a) is concerned. In paragraph 20 above we have ourselves examined section 16(2)(b) and section 16(2)(c). There is in our view a doubt as to whether section 16(2)(b) covers dishonestly obtaining overdraft facilities by deception. We revert to this point below[80] and provisionally propose that this gap, if it be a gap, should be closed by a provision making such conduct an offence. Subject to that, we do not think that the limitation of the offence of conspiracy will leave any gaps which will need to be filled by the creation of further offences in the areas with which section 16(2)(b) and section 16(2)(c) are concerned.

Deception

38. Deception, as defined in section 15(4) of the Theft Act 1968, is one of the elements of the offences of obtaining property and obtaining a pecuniary advantage. There has so far

78. D.P.P. v. Kamara [1973] 3 W.L.R. 198.
79. Working Paper No. 54.
80. See para. 78 below.

been little judicial consideration of this definition but as we have seen[81] the recent decision of the House of Lords in D.P.P. v. Ray[82] suggests that the word "conduct" in the definition will be given a wide meaning. It has also been held by the Court of Appeal[83] that under section 16 of the Theft Act the deception need not be of the person from whom the advantage is obtained. Two aspects need fuller consideration.

(a) A false general impression

39. It has been said that an agreement to present a concerted false front may suffice for conspiracy to defraud, even though the falsity might be too general to come within the Theft Act definition of deception or be too vague to establish a clear causal connection with the obtaining of any property or pecuniary advantage. This type of case has been described[84] as the characteristic use to which the charge of conspiracy to defraud is now put, the indictment alleging dishonest conduct which is difficult to formulate in terms of a deception within the statutory definition. A typical case is R. v. Parker and Bulteel[85] where the defendants were directors of a bank which failed and they were charged, inter alia, with conspiracy to defraud. Avory J. considered that

81. See para. 14 above.

82. [1973] 3 W.L.R. 359.

83. R. v. Kovacs [1974] 1 W.L.R. 359. In this case the defendant, contrary to her bank's instructions, used her cheque book and bank card to obtain goods from a shop, deceiving the shop by her conduct into thinking that she was entitled to use the cheque book and card. She was convicted of obtaining a pecuniary advantage from her bank.

84. T.B. Hadden, "Conspiracy to Defraud" [1966] C.L.J. 248.

85. (1916) 25 Cox C.C. 145.

all the counts could have been dealt with as one -

> "containing substantially this charge, namely, that these defendants ... conspired - that is, combined - together to cheat and defraud persons who either were customers or who might become customers of the bank by falsely representing to them that the bank was solvent, that the bank was conducting its business in the ordinary way in which a banker's business is conducted, and that they were in a position to fulfill in the ordinary course the obligations imposed upon them as bankers who received money from their customers ..."[86]

Since almost any act in the course of business might be thought to involve such representations, a jury might infer fraud from what amounted to no more than reckless trading, but Avory J. was at pains to exclude any such interpretation being placed upon his words. He said -

> "the ordinary trader does not by the mere fact that he keeps his premises open for business represent that he is at that moment solvent. A very little will be sufficient, even in the case of the ordinary trader - if he gives an order in terms which contain any implication that he is solvent that is quite sufficient to make him liable for a false pretence[87] in law ... there is in my view a difference in the position of a banker from that of an ordinary trader. The business of a banker is to trade with other people's money ... The banker by the very carrying on of his business does impliedly represent that he is in a position to fulfil his obligations."[88]

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86. Ibid., at 148-9.

87. Though "false pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences" - Scott v. Brown, Doering, McNab and Co. [1892] 2 Q.B. 724, per A.L. Smith L.J. 733; see also R. v. Hudson (1860) Bell 263.

88. (1916) 25 Cox C.C. 145, 149-150.

40. There are cases which have been charged as conspiracy to defraud where the unlawful means used to prejudice another did not involve any deception. We deal with such cases later[89]. But where the essence of the conduct agreed upon is a deception, we think that the definition in section 15(4) of the Theft Act 1968 would be sufficiently wide to describe the deception element in any case which might now fall within the ambit of conspiracy to defraud. We shall be particularly interested to hear from those who comment upon this Paper as to whether we are correct in this.

(b) Machines

41. In Davies v. Flackett[90] the defendant parked his car in a car park, payment for which was expected on leaving by the insertion of a coin in the automatic barrier. He found, on driving to the exit, a stranger holding up the barrier, and he thereupon drove away without paying. He was charged with obtaining a pecuniary advantage by deception and the magistrates acquitted him. The prosecutor's appeal to the Divisional Court was dismissed. The question in the case was whether an act of deception directed towards a machine in the absence of any human agent was sufficient to support a conviction. The Divisional Court held that this question was not the appropriate one; if an offence under section 16 of the Theft Act was to be established, it was necessary to show not only that a deception was practised but also that it was effective in securing the pecuniary advantage. On the facts no advantage could be said to have been obtained from any deception. The Court did not, therefore, directly decide whether it was possible for a deception to be practised without there being a human mind to be deceived, but said that this was doubtful. We do not think that the definition of deception

89. See paras. 46-47 below.
90. [1972] Crim. L.R. 708.

in section 15(4) of the Theft Act is apt to include the dishonest misuse of or tampering with a machine. There can, we think, be no doubt that, had the person holding up the barrier and the defendant agreed so to act in order that the defendant might escape payment, they would have been guilty of a conspiracy offence. In the absence, therefore, of some other element in the conduct such as falsification of an account or, as in our recommendations in regard to forgery[91] covering the use of a false instrument, the "deception" of a machine provides another example of conduct which might escape punishment if our conspiracy proposals were implemented[92].

Commercial swindles with or without deception

42. There have been prosecutions for conspiracy to defraud in cases where the element of deception has been of little, if any, importance. These cases fall into two main types -

(a) cases where there has been no specific deception, but a combination by the defendants to falsify the transaction so that all is not what it seems to be, and

(b) cases where there is no deception, but a combination to deprive a victim dishonestly of that to which he is legally entitled.

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91. (1973) Law Com. 55, para. 36 and clause 6(4).

92. Of course, if property is obtained by the misuse of a vending machine then this is theft under the Theft Act, s. 1.

(a) Falsified transactions

43. In Scott v. Brown, Doering, McNab & Co.,[93] the plaintiff and M had agreed to purchase for P on the Stock Exchange a number of shares at a premium, with the sole object of inducing members of the public to believe there was a market for the shares and that they were at a premium. The purchase was "an actual purchase and not a sham purchase"[94] but the premium which it was hoped to produce would not be justified by the true position of the company. The Court of Appeal dismissed the plaintiff's claim to recover the purchase money he had entrusted to M, because the scheme, being a "deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company"[95], was an indictable conspiracy to defraud, and the agreement was, therefore, unenforceable. Whether or not it would be possible to frame an indictment charging an offence under section 15 of the Theft Act on the basis of a deception by conduct on the facts of this case is somewhat doubtful. It may be that here there would be a gap in the law.

44. In the leading case of Sinclair[96], the directors of a company transferred almost the whole of a company's assets to an outsider in return for a vague agreement that he would use them to inject capital into the company. He in fact bought a controlling interest in the company. The directors were convicted of conspiring to defraud the company, its shareholders and creditors. The mischief of such an offence may be variously described as appropriating the property of the company (and in a non-legal sense of its shareholders), or taking a dishonest

93. [1892] 2 Q.B. 724. The actual facts are unlikely to recur in relation to the issue of shares, with increased control over dealers in securities and their licensing provided by the Prevention of Fraud (Investments) Act 1958, ss. 1-9.

94. Ibid., per Lindley L.J. at 729.

95. Ibid., per A.L. Smith L.J. at 734.

96. [1968] 1 W.L.R. 1246.

risk with company assets prejudicial to the interest of the minority shareholders and the creditors. Arguably, what the defendants did might now amount to theft from the company[97]. It is also an offence under section 54 of the Companies Act 1948, though punishable by a £100 fine only, for a company to give, whether directly or indirectly, (whether by loan, guarantee or otherwise) any financial assistance in connection with the purchase by any person of any shares in the company. In addition, section 332(3) of the Companies Act 1948 provides that, where a company has been wound up, every person who was knowingly a party to the business of the company being carried on with intent to defraud creditors of the company or any other person, or for any fraudulent purpose, is guilty of an offence, punishable with 2 years' imprisonment[98]. Had the company in Sinclair been wound up the directors could have properly been charged under this section.

45. Other dishonest agreements involving an agreement to commit a direct interference with property or legal rights, have been caught by a charge of conspiracy. An agreement by debtors to conceal goods from creditors in anticipation of bankruptcy has been held to be a conspiracy[99], as has an

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97. Although the company owning the assets "consents", absence of consent is not an element of theft; and as long as the defendants did not believe that they had a legal right to do what they did, they are "dishonest"; the other elements of theft are present.

98. The Companies Bill introduced in the last session of Parliament would have removed the requirement that the company should be wound up, and would have increased the maximum sentence to 7 years' imprisonment. Clauses 107 and 108(1). This Bill also proposed an increase in the penalty for a contravention of section 54 to imprisonment for 2 years and an unlimited fine.

99. Hall (1858) 1 F. & F. 33. It may be conspiracy to defraud to agree to defeat a judgment creditor in certain circumstances; see Richardson (1834) M. & Rob. 402 (indictment held bad because no unlawful means alleged to do what could be done lawfully); Wood v. Dixie (1845) 7 Q.B. 892 (sale with intent to defeat judgment creditor valid; but a mere colourable sale might be void); and Cox (1884) 14 Q.B.D. 153 (admission of evidence; indictment not discussed).

arrangement to confer a fraudulent preference on one of several creditors[100]. Other cases more closely resemble theft. In Quinn[101] railway employees took used but uncancelled tickets and resold them at a lower price for re-use. They and some of their "customers"[102] were convicted of conspiracy to defraud the railway (of the fares due). In de Kromme[103] the defendant went to a warehouse and tried to bribe an employee to sell him goods below the listed price. He was convicted of inciting the employee to conspire with him to cheat and defraud his employer.

(b) Financial prejudice without deception

46. The Court of Appeal has held in R. v. Scott[104] that to sustain a charge of conspiracy to defraud there is no necessity to prove an agreement to defraud by deceit. The court held that it was sufficient that there was an agreement to prejudice the rights of another without lawful justification in circumstances of dishonesty. The accused were charged with conspiring to defraud the owners of the copyright in a number of films by copying and distributing films without the consent of the owners and so defrauding them of the fruits of their copyright. A similar result was reached in Willetts[105] where the defendants were convicted for conspiring to print and publish sheet music without the consent of the owner of the copyright, with intent to defraud the owner of the fruits

100. Potter (1953) 1 All E.R. 296.

101. (1898) 19 Cox C.C. 78.

102. Who, of course, knew tht the tickets were "stolen"; cf. R. v. Absolon and Clark (1859) 1 F. & F. 498, where the defendants were indicted for conspiring to defraud a railway company by "obtaining" non-transferrable tickets and reselling them; they were acquitted, probably because the jury were not satisfied of an agreement. But it is not clear how A had got the tickets, which he sold to C.

103. (1892) 17 Cox C.C. 492; cf. Button (1848) 3 Cox C.C. 229, see para. 35 above.

104. [1974] 2 All E.R. 204, now on appeal to the House of Lords.

105. (1906) 70 J.P. 127.

of his copyright. This was not larceny, and is not theft without resort to a very tortuous construction of the Theft Act[106]. It seems right to conclude that any combination with the object of interfering directly with property or other legal rights is a conspiracy to defraud, if the combination has an additional element of "dishonesty".

47. It would seem to follow that, in the field of economic fraud in commerce, there would probably be gaps left by the restriction of conspiracy we have proposed. Acts which fall outside the Theft Act or other substantive offences may amount to conspiracies, the main categories being those where there is no "taking" or appropriation of any sort. It seems that any dishonest act, even when it involves neither deception nor the more general falsification of a transaction, which has the effect of depriving a person of anything or, indeed, prejudicing him economically in any other way will suffice to found an indictment for conspiracy.

Gambling swindles

48. A charge of conspiracy to defraud has been used in a number of cases where defendants have combined to rig an apparently fair contest, with a view to eventual profit as bookmakers or punters, or to induce another to bet upon what he

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106. A copyright appears to be property within s. 4(1) of the Theft Act; the defendant's conduct may well be an "appropriation" within the wide phrase "any assumption... of the rights of an owner"; but unless a copyright can be divided into infinite pieces, each corresponding with an issue of the work in respect of which the copyright subsists, there is no intention of permanently depriving the owner of anything. A prosecution under s. 15(1) would be difficult because it would have to be shown that purchasers of the sheet music actually adverted to the question of copyright; see Laverty [1970] 3 All E.R. 432. There is an offence under the Copyright Act 1956, but this carries only a penalty of a fine of £2, or, on a second conviction, of 2 months' imprisonment.

thinks is a certainty, having so arranged things that he will lose the bet. This has been held to be a conspiracy to cheat and defraud[107]. Such facts would seem now to amount to an offence under section 15 of the Theft Act, but more difficult cases arise where the agreement is to "fix" football matches or dope racehorses in order to defraud those who bet with the conspirators on the results of the matches or races[108]. We have referred earlier[109] to the doubts which arise on the construction of section 17 of the Gaming Act 1845 and it is probably for this reason that some of these charges have been laid as conspiracies to defraud. There may be other examples of conduct in this area which restriction of conspiracy would leave unpunished.

Dishonest failure to pay for goods or services

49. The Criminal Law Revision Committee have dealt with the case of D.P.P. v. Ray[110] in paragraphs 19 and 20 of their Paper. It seems clear that the defendant and his companions could have been successfully prosecuted for conspiracy to defraud. It would seem that they could equally have been prosecuted for conspiracy even though no deception whatever had been practised by them, for example, if their change of mind had occurred whilst the waiter was out of the room and they had acted at once upon it. If the crime of conspiracy were confined to conspiracy to commit an offence, there would be no offence for which the defendants could have been prosecuted if the facts had been as stated in the last sentence.

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107. R. v. Hudson (1860) Bell 263; 8 Cox C.C. 305.

108. See R. v. Fountain [1966] 1 W.L.R. 2124; R. v. Gould [1965] Crim. L.R. 547 (reported on a question of costs); R. v. Mitchell [1964] Crim. L.R. 297 (reported on a question of admissibility of evidence) - doping a racehorse; R. v. Bleakley and Taylor [1967] Crim. L.R. 660 (an appeal against sentence) - the introduction of marked cards into a casino.

109. See para. 22 above.

110. [1973] 3 W.L.R. 359.

The Committee have, however, provisionally proposed[111] that it should be an offence dishonestly to go away without paying and without intending to pay. If this were accepted there would be no gap left in this area by confining conspiracy to conspiracy to commit an offence.

Non-economic prejudice

50. We have considered in some detail at the end of the last section and the beginning of this section the meaning of prejudice as an element in conspiracy to defraud; it is clear that it includes disadvantages to the victim which are not in any way economic. In conspiracy to defraud the width of the concept of prejudice may, in part, be due to the existence of the offence of conspiracy to commit a "public fraud", often prosecuted as conspiracy to effect a public mischief. These cases involve dishonest interference with the proper discharge of governmental or other public functions. Whether this is properly to be considered as part of a unified conspiracy to defraud offence or as a separate offence is doubtful[112], but it is clearly necessary for us to consider how far, in the decided cases on conspiracy to defraud, prejudice has been extended beyond what may readily be characterised as economic loss.

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111. Committee's Working Paper, paras. 38-39.

112. Dr. T.B. Hadden concludes from an examination of the old cases that until the nineteenth century, there was one offence only, of a "public" nature, "public" here meaning either affecting the public or the breach of a legal duty. But with the acceptance of false pretence as a general basis of private frauds, a distinct line of authorities dealing with "private" conspiracies to defraud emerged. Since a number of offences existed apart from conspiracy and since also the reports are not always very clear, it is hard to draw conclusions from the earlier cases. The first clear case of "private" conspiracy to defraud appears to be R. v. Hevey (1782) 1 Leach 232. See generally, Hadden, "The Origin and Development of Conspiracy to Defraud", (1967) 11 Am. J. Legal Hist. 25.

51. Some Criminal Codes[113] in common law countries require no more for the mental element in forgery than an intention that a person be induced to do or refrain from doing some act. In English law, however, we think that, both in forgery where intent to defraud is an element in the offence, and in conspiracy to defraud, it must be shown that the conduct which the accused intended to induce was conduct to some person's prejudice. In R. v. Aspinall[114], the defendants who were floating a new company, were accused of conspiring to induce the committee of the Stock Exchange to include a quotation of the shares of the company in the official list when the rules relating to settling days were not being complied with. It was held that this was an insufficient allegation of conspiracy to defraud[115]. It is clear, however, that the idea of prejudice in conspiracy to defraud extends far beyond mere economic disadvantage[116].

52. It is clear from the decision of the House of Lords in Welham v. D.P.P.[117] that it is a sufficient prejudice if a person charged with a legal duty is deceived into doing something that he would not have done but for the deceit or not doing something that, but for it, he would have done[118]. We have recommended in our Report on Forgery[119] that prejudice of

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113. Australian Commonwealth Crimes Act (1914-1966), s. 63 and Canadian Criminal Code (1954-1966), s. 309(1)(b).

114. (1876) 2 Q.B.D. 48.

115. Their conviction was, however, upheld, because the indictment further alleged that this was to persuade buyers that the rules had been complied with which, the Court held, amounted to an allegation of an intent to induce buyers to part with their money.

116. Although in some cases economic advantage to the criminal is the ultimate objective; see e.g. R. v. Newland [1954] 1 Q.B. 158.

117. [1961] A.C. 103; discussed above, see para. 26.

118. Although the headnote of the report in the case limits this to public duties, it is clear from the speeches that any duty will suffice.

119. (1973) Law Com. 55.

a non-economic kind should in respect of forgery be limited to cases where the person prejudiced has a duty to act or refrain from acting; we have no doubt that if any general deception offence were created it should be at least as closely circumscribed[120].

53. It is desirable at this stage briefly to examine some of the authorities where a charge of conspiracy to defraud has been used to cover this sort of case. In R. v. Brailsford[121], the defendants were convicted of conspiracy to effect a public mischief by obtaining a passport from the Home Secretary by false pretences as to its intended use. In R. v. Bassey[122], the defendant obtained admission to the Inner Temple as a student by means of forged references. He was convicted, inter alia, of conspiracy to effect a public mischief. The Court of Criminal Appeal held that the Benchers of an Inn of Court owed a duty to the public to admit properly qualified persons, and that an intention to impede the proper exercise of that duty was a sufficient intent to defraud. In R. v. Wolis[123] the defendant was convicted of conspiracy to deceive the Home Secretary (who had a duty to consider the facts) into refraining from making a deportation order in respect of an alien convicted of a criminal offence; he had, in a petition, made statements as to the alien's previous good character which he knew to be untrue. These three cases all concern the exercise of a duty in the public sphere.

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120. This would not rule out the creation of, e.g., a particular deception offence to cover dishonestly deceiving a person to give information; see para. 76 below.

121. [1905] 2 K.B. 730.

122. (1931) 22 Cr. App. R. 160.

123. (1910) 7 J.P. 28.

54. In R. v. Newland[124] the defendant deceived a manufacturer into supplying him with pottery by pretending that it was going to be exported when in fact was intended for resale on the home market. The regulations required that pottery should be exported unless a licence for domestic sale was obtained; they applied, however, only to the manufacturer so that the defendant was not in breach of them. It seems clear that the ratio decidendi of the Court of Criminal Appeal was that the "Government" or the State was the person injured by the conduct which would have defeated the object of the legislature in setting up the scheme, and that there was, therefore, an indictable conspiracy to effect a public mischief. The same result could have been reached by applying the test subsequently adopted in Welham v. D.P.P.[125]. In Board of Trade v. Owen[126] as we have seen[127], the defendants were acquitted of conspiring to defraud a department of the government of West Germany by obtaining by deception the grant of export licences, only because it was held that there was no criminal jurisdiction in respect of the deception of the German authorities in Germany.

55. It will be appreciated that the motives behind the fraud in these cases differ. In Wolis and Brailsford the defendants wished to influence a government department to do some act which had legal, but not financial consequences. In Newland, Owen and Bassey the fraud was the first step towards illicit trade or practice which might not, however, actually "prejudice" any person, in that those dealing with the defendants might get value for money. In Welham, the motive was concealment of an illegal hire-purchase agreement which had already been made. Many statutes creating regulatory schemes or licensing arrangements create particular deception

124. [1954] 1 Q.B. 158.
125. [1961] A.C. 103.
126. [1957] A.C. 602.
127. See para. 31 above.

or forgery offences[128]. Where these may fail to cover all possible evasions or malpractices there might be a gap in the criminal sanctions available if there was no element of forgery, and if conspiracy were limited to conspiracy to commit an offence.

56. There are other fact situations where an application of this test of prejudice would seem to provide a criminal sanction for conduct in combination (or by means of a forged document). Obtaining of overdraft facilities by deception (without actually using them) would seem to prejudice the bank manager granting them, for he would be under a duty only to grant such facilities to suitable customers[129]. Similarly the obtaining of information by, for example, deceiving a bank official contrary to his duty to reveal the state of a customer's account, or the obtaining of entry to a building by deceiving a door-keeper, who was under a duty to restrict entry to authorised persons, would both amount to fraud. It seems clear that it is in the field of non-economic prejudice that there will be the most pressing need for the creation of a new offence or new offences if conspiracy is restricted.

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128. See Appendix to Working Papers Nos. 26 and 33 and the Repeal Schedule to the Forgery and Counterfeit Currency Bill appended to Law Com. 55.

129. It may also be regarded as an economic fraud in that the bank has to arrange its affairs in the light of its potential liability to advance money in terms of the agreement. In an American case a computer programmer instructed the computer not to print his overdraft statements thus enabling him to exceed the amount to which he was entitled; if he thereafter drew cash from the bank he would be guilty of obtaining property by deception but if he gave a cheque to a third party, it might be difficult to convict him of an offence unless obtaining overdraft facilities by deception was itself an offence. We discuss this situation when we deal with machine frauds: see para. 63 below.

Summary

57. We are now in a position to summarise the gaps which would be left in the criminal law were conspiracy to defraud abolished and thence to proceed to consider whether and to what extent they require filling by new substantive offences. We are particularly anxious that those who read this Paper should draw to our attention any omissions which we may have made in identifying them as follows -

(a) The temporary deprivation of the property of another, including the use of another's facilities (paragraph 35).

(b) The taking of land or those things excluded from being the subject of theft (paragraph 36).

(c) Deceiving machines (paragraph 41)

(d) Commercial swindles of the type exemplified in Scott v. Brown, Doering, McNab & Co., Hall, Scott and Sinclair (paragraphs 43-47).

(e) Gambling swindles (paragraph 48).

(f) Dishonest failure to pay for goods or services (paragraph 49).

(g) Certain non-economic frauds not covered by specific legislation such as the Perjury Act 1911 and the Forgery Act 1913 (paragraphs 53-56).

SECTION III : SCOPE OF LEGISLATION REQUIRED

The temporary deprivation of property

58. Subject to section 6 of the Theft Act 1968[130] no offence is committed under section 1 or section 15 of the Act unless there is an intention of permanently depriving a person of property. But to appropriate or to obtain by deception the temporary possession of property may nevertheless result in a permanent loss to its owner. One such type of loss is where, owing to the temporary deprivation, the virtue goes out of the article. As we have seen[131], this is probably covered by section 6. But even where the virtue is not totally exhausted, as, for instance, where an electric battery is half used up or a season ticket to football matches is used only for some matches and returned before the end of the season, there are almost certainly offences under the Theft Act. In the case of the battery there would be an offence under section 13 (dishonestly using electricity), and in the case of the football ticket an offence under section 1, because what is appropriated is a thing in action which is included in property as defined by section 4(1). There remains, however, the temporary taking of a chattel which is not substantially affected by the use made of it, but from which the owner would have derived a profit had he not been deprived of it.

59. Where someone induces his victim by deception to part with his property in expectation of payment for its use intending never to pay he now commits an offence under section 16(2)(a) of the Theft Act, and he will commit an offence under the Criminal Law Revision Committee's provisional proposals[132]. But, if he merely takes for his own temporary use and unknown to the owner, the same chattel for the use of which the owner would have expected payment, he will be guilty of no offence, if the use he makes of the article has no real effect on its life or usefulness. It is a possible view that, despite the

130. As to which see para. 10 above.

131. Ibid.

132. See para. 25 of the Committee's Paper.

previous attitude of English law to such conduct, there should be criminal liability in these cases and it is difficult to distinguish between cases where the property is acquired by deception and where it is merely appropriated[133]. A satisfactory test might be to require an intent to deprive the victim of the charge he would normally have made for the use of the property taken. This would avoid making criminal the type of case which is exemplified by the unauthorised "borrowing" of a neighbour's lawn mower and would accord with the approach of the Committee in paragraph 28 of their Paper. Nor would it penalise the unauthorised use of another's facilities as occurred in the exceptional circumstances of R. v. Button[134], which probably does not call for criminal sanctions.

The taking of land etc.

60. The Criminal Law Revision Committee considered in detail[135] the question whether land, things growing wild, and game should be included in property capable of being stolen and reached the compromise solution now embodied in section 4 of the Theft Act 1968. It is our provisional view that the abolition of the offence of conspiracy to defraud would call for no change in this. It will be remembered that all property can be the subject of an offence under section 15 of the Theft Act.

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133. There seems to be no merit, for example, in distinguishing between the case where a farmer deceives an owner of machinery into letting him have the use of a machine without payment and the case where the farmer surreptitiously takes and uses the machine without making payment.

134. (1848) 3 Cox C.C. 229.

135. (1966) Cmnd. 2977, paras. 40-58.

Misuse of a machine

Introduction

61. There are three main types of machine which may be fraudulently manipulated. These are vending machines, machines such as parking meters and telephones[136], which enable a person to obtain by payment a service or facility, devices such as automatic barriers at the exit to a car park[137], which are provided to receive payment for a facility already enjoyed and, finally and most importantly, computers and similar machines. Vending machines provide no problems; if goods are dishonestly obtained from such a machine, it is theft. However, the other two sorts of machine call for more detailed consideration.

Parking Meters, etc.

62. In an article[138] written before the decision of the House of Lords in D.P.P. v. Turner[139], Professor Smith referred to what is apparently the practice of charging under section 16 of the Theft Act those who operate parking meters with other than the proper coin. Relying on the decision of the Court of Appeal in R. v. Locker[140] he concluded that it would not be possible to rely upon deception of the traffic warden to found such a charge. Since D.P.P. v. Turner, however, it would seem that this conclusion is no longer correct[141]. But the case exemplified by Davies v. Flackett[142], where one person held the automatic barrier at the exit of a car park which enabled another to leave without paying, would not, we think,

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136. R. v. Hallas & Ors., The Times, 4 October 1973.
137. As in Davies v. Flackett [1972] Crim. L.R. 708.
138. The Law Society's Gazette, 28 June 1972, p. 576.
139. [1973] 3 W.L.R. 352.
140. [1971] 2 All E.R. 875.
141. See para. 16 above.
142. [1972] Crim. L.R. 708.

be covered. So far as parking meter offences are concerned, we agree with Professor Smith that this type of dishonesty is adequately covered by section 42(4) of the Road Traffic Regulation Act 1967[143] and that there should be no need to invoke the heavy artillery of section 16 of the Theft Act. So far as other examples of dishonest conduct in relation to parking meters, telephones and other machines providing a service or facility are concerned, our provisional view is that there is no need for the inclusion in fraud legislation of a specific offence; it seems to have been the experience in England that cases of this type have nearly always been of a trivial nature and, if control by criminal sanctions is needed, we think that this can most appropriately be done by means of offences of a regulatory nature. In the great majority of cases there will be a dishonest use of electricity, which is an offence under section 13 of the Theft Act 1968.

Computers

63. Computers and other like machines present a potentially much more serious possibility of fraudulent misuse[144], since, with their increasing use in banking and industry, their fraudulent manipulation becomes more likely and the consequences more serious than in the other types of machine frauds we have considered. The fraudulent manipulation of a computer can be achieved either by feeding false information into it, or by programming it so that it will produce a false result from genuine information. Where this is resorted to in order to obtain money or other property, the manipulator will in general be guilty of an existing offence -

(a) It may be theft, if he draws money from a bank, or goods from a store, to which he knows he is not entitled, but to

143. Which provides for a fine of £50, or 3 months imprisonment.

144. Gerald McKnight, Computer Crime, (Michael Joseph 1973).

which computer-produced documents indicate that he is entitled (Theft Act, section 1).

(b) It may be obtaining property by deception if he relies upon another being deceived by the false information he has caused the computer to produce into handing the money or goods to him (Theft Act, section 15).

(c) It may be false accounting if he falsifies any document (such as a bank credit slip or an invoice) required for an accounting purpose, or if he causes a computer to produce a false account by making in an account an entry which is false or by omitting a material particular from an account (Theft Act, section 17), or

(d) It may be forgery at least under the proposals in our Report on Forgery[145], if he makes a false document to be processed by a computer.

Our provisional conclusion is, therefore, that there is no necessity to rely, in prosecuting such cases, upon conspiracy to defraud. There would, accordingly, be no gap in the law this area if conspiracy were to be restricted as proposed. We appreciate, however, that the uses to which computers can be put are very varied, and we would be particularly grateful for views on this conclusion.

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145. (1973) Law Com. 55; Appendix A, clause 6(4) which equates inducing a machine to respond to a false instrument as if it were genuine, with inducing a person to accept a false instrument as genuine.

64. There have been cases where persons have obtained unauthorised access to computers and have so been able to abstract information from them. The question of whether such conduct is, or should be, criminal is a more difficult one, and involves wider issues, which we touch upon in paragraphs 74-77. Specifically in regard to causing a computer to supply information, there would always be a dishonest use of electricity contrary to section 13 of the Theft Act with which to charge the wrongdoer.

Commercial swindles with or without deception

65. It is our provisional view that the exceptional circumstances which led to charges of conspiracy to defraud which we have considered in paragraphs 43-47 do not call for the provision of an offence or offences in fraud legislation. We think that it would be inappropriate in a general statute to attempt to cover such exceptional cases, and we feel that a general offence of dishonestly prejudicing another economically would be unacceptably wide. It is our view that special cases of this nature should be dealt with in legislation related to the matters with which they are concerned, as indeed, in most cases they are.

(a) The types of fraud exemplified by Scott v. Brown, Doering, McNab & Co.[146], and Sinclair[147], which probably cannot be prosecuted under section 15 of the Theft Act 1968, are best dealt with by specific legislation in relation to companies[148];

146. [1892] 2 Q.B. 724.

147. [1968] 1 W.L.R. 1246.

148. As pointed out in fns. 93 and 98, provisions such as those for the licensing of dealers in securities (Prevention of Fraud (Investments) Act 1958) and likely amendments to the Companies Act 1948 will meet future situations of this kind.

(b) An agreement to conceal goods from creditors in anticipation of bankruptcy, or to confer a fraudulent preference on one of several creditors[149] falls to be dealt with under the bankruptcy law;

(c) Dealing in used uncancelled railway tickets[150] would be caught as theft;

(d) Bribing a trader's employees to sell goods at below the proper price[151] would now be an offence under section 1 of the Prevention of Corruption Act 1906;

(e) Conspiring to defraud by dishonestly printing and publishing material protected by copyright[152], so depriving the owner of the fruits of his copyright, is a very special case and in our view is best dealt with under the copyright law. It is, of course, an offence under s. 21 of the Copyright Act 1956 to make for sale or hire, or to sell or let for hire or by way of trade any article in breach of copyright. There could, therefore, under our conspiracy proposals be a charge of conspiring to commit this offence. The Working Party proposed[153] that in regard to

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149. Hall (1838) 1 F. & F. 33, Potter [1953] 1 All E.R. 296. The present law penalises an adjudged bankrupt, who, with intent to defraud his creditors or any of them, makes any transfer of his property, or conceals or removes any part of his property after, or within two months before the date of any unsatisfied judgment against him, Bankruptcy Act 1914, s. 156(b) and (c).

150. Quinn (1898) 19 Cox C.C. 788.

151. de Kromme (1892) 17 Cox C.C. 492.

152. Willetts (1906) 70 J.P. 127; R. v. Scott [1974] 2 All E.R. 204.

153. Working Paper No. 50, para. 122.

> summary offences the penalty for conspiracy should be limited to the penalty provided for the substantive offence (in this case a fine of £2 or, on a second conviction, imprisonment for 2 months), unless the conspiracy was to commit more than one offence of the same kind, when it should be triable on indictment and carry a maximum penalty of 2 years' imprisonment[154]. It may be that it would be more satisfactory that the penalties under the Copyright Act should be increased.

We would welcome comment on these conclusions.

Gambling swindles

66. It is our provisional view that, having regard to doubts that may rise on section 17 of the Gaming Act 1845 to which we have referred in paragraph 22, the law should provide more adequately and with greater clarity for frauds in connection with gambling that it does at present. In addition conduct which might now not fall within section 17 of the Gaming Act, nor within section 15 of the Theft Act, and which can now be caught by a conspiracy to defraud will no longer be punishable if conspiracy is limited as proposed. The main mischief to be prevented is the use, with intent to make a gain for oneself or another, or to cause loss to another, of any fraud, unlawful device or ill-practice to affect the outcome of any game or event, upon which anyone stands to lose or gain in money or moneys worth, whether as a participant or by betting on the outcome. The penalisation of such conduct would meet most cases of fraudulent gaming.

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154. Ibid., para. 123.

Non-economic frauds

Introduction

67. It is clear that specific legislation will be needed in this field. We have already seen[155] how, faced with the problem of defining "defraud" in the offence of forgery, we recommended a generalised definition based on causing prejudice to the victim; in the area of non-economic fraud we defined "prejudice" as being an act or omission resulting from the acceptance of a false instrument as genuine in connection with the performance of any duty[156]. We have also attempted[157] to identify those activities in this field which have been made the subject of charges of conspiracy to defraud and suggested some others where, on the general principles found in the decided cases, such a charge would lie. Before we consider whether a solution along the lines of the forgery recommendation would be acceptable in the wider context of fraud generally we think it desirable to examine in more detail those activities in the field of non-economic fraud which may arguably be the proper concern of the criminal law.

False statements made in relation to legislative schemes

68. In paragraph 25 above we referred to the Commission's proposals[158] for new offences to take the place of the offences in sections 2-6 of the Perjury Act 1911. On consultation these proposals met with broad approval. They would penalise -

(1) The making of false statements in relation to births, marriages and deaths, and

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155. See paras. 32-34 above.
156. (1973) Law Com. 55, Appendix, draft clause 6(3).
157. See paras. 53-56 above.
158. In Working Paper No. 33, para. 21(c).

(2) The making of false statements made -

(a) on oath otherwise than in judicial proceedings,

(b) in a statutory declaration, or

(c) in any oral or written statement required or authorised by, under, or in pursuance of an Act of Parliament.

Such provisions would cover some part of the field of non-economic fraud; they would cover both written and oral statements made, for example, "to obtain registration under an Act of Parliament as a person qualified to practice a vocation"[159]. The basis of this proposed offence is not prejudice to the victim but the conduct of the person committing it. It would not, of course, cover lies told outside a legislative scheme, such as lies told for the purpose of obtaining entry to an Inn of Court[160]. In most cases no doubt the conduct envisaged could be brought within the "prejudice" principle in that the purpose of the lie would be to induce someone to act in connection with the performance of his statutory duty; but where the sole purpose for which a statement is "required" is the collection of information, this would need a somewhat strained interpretation. It is our provisional view that specific offences on the lines of the Commission's proposal are required but that their proper place in the criminal code is not in the "administration of justice" part to which perjury itself belongs and with which they have no necessary connection.

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159. Perjury Act 1911, s. 6.

160. R. v. Bassey (1931) 22 Cr. App. R. 160, and para. 71 below.

Fraudulently inducing non-fulfilment of statutory duty

69. Where a person is under a statutory duty to act in a particular way (whether on pain of a penal sanction or not) and he is induced by deception to act otherwise than in that way, the person so inducing him should, in our view, be guilty of an offence. This should be so (in cases where a penal sanction is provided for not acting in accordance with the duty) whether the person induced to act would be guilty of an offence, as he would be if his liability were strict, or whether he would not be guilty because, by reason of the deception, he did not have the mental element required for the offence. These types of cases are exemplified by R. v. Newland[162] (though the decision there was not founded on this approach). They would all fall within the prejudice formula.

Obtaining the grant of a licence etc.

70. It is our provisional view that it should be an offence fraudulently "to induce any person to grant any licence, certificate or permission required or given by or under any statute, or under any powers conferred by statute"[163]. Such a provision would cover the conduct discussed by Lord Tucker in Board of Trade v. Owen[164] on the hypothesis that it was the British and not German authorities who were induced to grant the export licences. There are other official documents such as passports[165], issued under the Royal Prerogative which might be subsumed under this head. These cases are all covered by the present law of conspiracy to defraud, since the definition of prejudice covers the situation where a person is fraudulently induced to perform a duty in a way which he would not otherwise have performed it.

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162. [1954] 1 Q.B. 158; and see paras. 54 and 55 above.
163. We are indebted to Mr. P.R. Glazebrook for this formulation.
164. [1957] A.C. 602; see para. 47 above.
165. R. v. Brailsford [1905] 2 K.B. 730.

Obtaining membership of an organisation or society

71. There are many organisations, membership of which is restricted in one way or another, to which entry can be obtained by deception, which are not part of any legislative scheme. They range from professional bodies such as the Inns of Court, membership of which is a prerequisite for qualification to practise a profession, to social clubs. It is our provisional view that criminal sanctions are appropriate at one end of this scale but inappropriate at the other. The test should, we think, be whether membership is a prerequisite to qualification, or itself confers some qualification against the fraudulent obtaining of which some protection is required in the public interest. There is no need, for example, to make it a criminal offence to obtain by deception membership of an association or club which confers merely a right to associate with other people or to use premises or facilities provided for purely social purposes. Expulsion from the club is, we think, a sufficient sanction in such cases. The prejudice formula would, however, cover both classes of case, because even social clubs will nearly always have a secretary or committee which has a duty to members of the club to admit only those with the requisite qualifications or attributes. It is our provisional view that there is no necessity for the law to go so far as to penalise a deception perpetrated merely to obtain membership of a social club, and that the adoption of the prejudice formula without qualification would produce a wrong result in this context.

"Covering up" an offence

72. In Welham v. D.P.P.[166] the deception practised by the use of forged documents was intended to deceive the relevant authority who might inspect the records into thinking that regulations had been complied with which had, in fact, been breached. If, instead of using a forged document, the

166. [1961] A.C. 103; see para. 45 above.

defendant had agreed with another to make false statements for the same purpose, he would, no doubt, have been guilty of a conspiracy to defraud. If the element of combination is taken away and the prejudice formula adopted, it would seem that an offence would be committed every time anyone guilty of another offence, however trivial, told a lie to any investigating authority which had a duty to discover and prosecute or otherwise invoke sanctions against the wrongdoer. In the result the fraud offence would frequently carry a much higher sentence than the offence its purpose was to conceal. If, in such circumstances, criminal sanctions ought to be available, we think that they belong more to the sphere of the administration of justice than to fraud. And, in that sphere, we think that such offences as are needed should be closely circumscribed. We hope in due course to publish a working paper on offences against the administration of justice.

Obtaining entry to premises

73. Where a charge is made for entry into premises the conduct involved in avoiding the proper charge by deceit or stealth comes within the sphere of economic fraud. In addition, entry to many premises may be restricted to persons who have permission to enter. Such permission may be circumvented. If the person deceived is, for example, a doorkeeper charged with a duty to his employer to prohibit the entry of unauthorised persons, then he is acting "in connection with the performance of his duty"[167] in allowing entry, and if the deceit is practised by means of a forgery, or in combination, a criminal offence is at present committed. But if the entry is effected surreptitiously without the doorkeeper knowing about, it, or if there be no doorkeeper and the entry is but a

167. See (1973) Law Com. 55, Appendix, draft clause 6(3).

civil trespass, then no offence is committed[168]. It is our provisional view that entry upon premises obtained by deception or stealth where no charge is thereby avoided is not conduct which need be the concern of a law of fraud.

Obtaining information

74. Conspiracy has also been used as a basis upon which to secure the conviction of persons who have conspired to deceive another, such as a bank manager, into giving information which it is his duty not to disclose except to those properly entitled to it[169]. In fact, the defendants were convicted on charges of conspiracy to effect a public mischief, but it is clear from the judgment of Lord Justice Cairns[170] that the facts also disclosed the offence of conspiracy to cheat and defraud. The common law offence of cheating (except in regard to revenue offences) has been abolished by section 32(1) of the Theft Act 1968, and, if the proposal to limit the crime of conspiracy to conspiracy to commit an offence is implemented, it will not be possible to charge such conduct either as a conspiracy to defraud or, probably, as a conspiracy to effect a public mischief.

75. In view of the complexities of these problems, which are connected only in part with conspiracy to defraud, we have hesitated in deciding whether this is the place in which to deal with the use of deception to obtain information. The

168. Unless the trespass is of the sort declared by the House of Lords in Kamara v. D.P.P. [1973] 3 W.L.R. 198 to be criminal in combination. In Working Paper No. 54 we have made provisional proposals as to when entry on property should be an offence.

169. R. v. Withers & Ors. [1974] 2 W.L.R. 26 (C.A.). Leave to appeal to the House of Lords has been granted.

170. Ibid., at 30.

Report of the Committee on Privacy[171] recommends the creation of an offence of surreptitious surveillance by means of a technical device, and in our Working Paper on Offences of Entering and Remaining on Property[172] we refer to the need at some stage to consider how far a trespass in order to invade privacy or obtain confidential information should be an offence. A further example of conduct in the sphere of obtaining information concerns the obtaining of information from a computer by a person not entitled to the information, who has in some way obtained the code necessary to cause the computer to disclose the information. There are examples both in England and in America of this having occurred. It bears similarities to the offence recommended by Committee on Privacy of surreptitious surveillance by means of a technical device, and to the deception of machine, as well as to obtaining information by deception. The question of invasion of privacy and of obtaining confidential information is a complex one, involving many aspects of both civil and criminal law, and not one which can be dealt with adequately or appropriately in the present context. Nevertheless, we feel that it would be useful at this stage to seek views on the limited question of whether inducing another by deception to give information should be an offence.

76. If such an offence were cast in the wide terms of inducing another by deception to give information, which but for the deception he would not have given, a very much more extensive offence than that held to exist in Withers would be created. It would not be necessary to show either that there was any element of injury to the community, or even that there was any duty upon the person deceived not to disclose the information. It may be thought that this would penalise too wide a range of conduct. If the offence were cast in the terms of inducing another by deception to give information which it was his duty not to disclose except to those

171. (1972) Cmnd. 5012, para. 563.
172. Working Paper No. 54 para. 50.

properly entitled to it, there would be some limitation upon the extent of the offence; but it could be contended that there is little justification for distinguishing between deceiving a bank manager into disclosing the bank balance of his client and deceiving a person into disclosing his own bank balance[173]. If either approach were adopted it would be possible to cover the obtaining of information from a computer by "deceiving" it, by a formula similar to that adopted in clause 6(4) of Appendix 'A' to our Forgery Report[174].

77. Neither of these alternatives may offer an ideal solution but it is our provisional view that either is preferable to making criminal liability dependant upon a conspiracy, or upon the view of the jury (subject to the discretion of the judge) as to whether the conduct amounts to a substantial injury to the community. This would in effect leave the boundaries of the criminal law in the hands of the judge and jury rather than in the hands of the legislature.

Obtaining overdraft facilities

78. There may be some doubt whether section 16(2)(b) of the Theft Act 1968 penalises not only the person who by deception dishonestly actually obtains a loan by way of overdraft, but also the person who obtains merely the right to borrow by way of overdraft, but has not exercised that right. The Criminal Law Revision Committee's proposals on section 16(2)(a) will not cover the situation. It is our provisional view that

173. This distinction is at present drawn in the law of forgery, and would continue if our proposals in regard to forgery were implemented. (1973) Law Com. 55, Appendix, Clause 6(3)(c).

174. (1973) Law Com. 55: this provides that references to inducing a person to accept a false instrument as genuine include references to inducing a machine to respond to a false instrument as if it were genuine.

it should be an offence to obtain overdraft facilities by deception. The grant of the facility by a bank obliges the bank so to manage its own affairs that it is in a position immediately to meet any exercise of the facility and it seems reasonable that it should be protected against being deceived into that position. There is protection at present where there is a conspiracy fraudulently to obtain such facilities, because the prejudice formula adopted in conspiracy to defraud would cover the fact situation normally likely to arise, as the official allowing the facility would thereby be exercising a duty placed upon him.

Other examples of non-economic fraud

79. We have been unable to think of any other sphere of activity where the law might properly provide criminal sanctions against lies or deceits practised to achieve non-economic ends. We should be grateful if those who comment upon this Paper would advise us of any other situations with which we have failed to deal.

Framework for offences of dishonesty

80. Looking ahead to the ultimate goal of codification of the criminal law it will be necessary to consider the pattern of offences upon which any restatement of the law in the field of dishonesty should be based. Although our views as to what offences may have to be spelled out as specific offences, were conspiracy to be restricted to conspiracies to commit offences, are as yet only provisional, it would be of assistance to us if those commenting on our proposals would consider in addition the possible patterns of legislation in this area.

81 The main question is whether the law of theft should be separated from the law of fraud. This is the view of, for

example, P.R. Glazebrook set out in the Criminal Law Review[175], and elaborated in a further memorandum to the Criminal Law Revision Committee, and it is one which has great attraction. The two offences are, after all, very different in nature. The subsidiary questions which arise are -

(a) Should there be a general fraud offence, rather than a series of separate offences based on particular examples of dishonesty? and

(b) Should the law concentrate on the method of dishonesty in defining the offences, or should it look to the results of dishonesty, and punish those who dishonestly cause prejudice to another without too great a regard to the nature of the dishonesty?

82. There are two main difficulties in framing a general fraud offence. In the first place, any general formulation such as that based upon causing prejudice by dishonesty may go too wide[176]. In the second place, to base a general fraud offence on deception would result in too narrow an offence: it would not cover the temporary taking of property by stealth as opposed to deception[177], nor those cases where there is dishonest conduct but no deception[178].

83. It is our provisional view that theft and fraud should be dealt with separately, and that the law governing economic fraud should be designed to protect against damage to proprietary and financial interests whether by deception,

175. [1972] Crim. L.R. 622.
176. See, e.g. paras. 65 and 71.
177. See para. 59.
178. See para. 46.

or dishonesty without deception. The obtaining of a financial benefit, even by deception, without causing loss to another should not necessarily be the concern of the law of fraud. We doubt whether at this stage it would be useful to consider in any detail the definition of an offence or offences to cover the conduct which we have suggested may need to be covered, or even whether this might best be covered by a general fraud offence rather than a number of separate offences. We are conscious that at least some of our provisional conclusions may be controversial, and the question of the form of any legislation must stand over until we have considered the comments we hope to receive, and we have formed final views on what conduct needs to be covered.

SUMMARY OF PROVISIONAL CONCLUSIONS

84. The summary of our provisional conclusions as to what conduct needs to be penalised and what conduct does not need to be penalised is as follows:

(1) Conduct which needs to be penalised

(a) In the economic field -

(i) The unlawful taking of property (not amounting to theft), without deception, which has the effect of depriving the victim of the charge he would have made for the use of the property. We seek views on whether there is any need to provide a wider offence to penalise, for example, the unauthorised borrowing of a neighbour's lawnmower, but our provisional view is that such an offence is unnecessary (paragraphs 58-59).

(ii) The fraudulent manipulation of machines which enable a person to obtain by payment a service or facility. This conduct should be penalised by specific legislation as required in parti - cular instances (paragraphs 61-62).

(iii) The use, with intent to make a gain or cause a loss, of any fraud or ill-practice to affect the outcome of any game or event, upon which anyone stands to lose or gain money whether as a participant, or by betting on the outcome. The offence should be created by addition to,and possibly reformulation of,section 17 of the Gaming Act 1845 (paragraph 66).

(b) In the non-economic field

(i) The making of false statements in relation to legislative schemes. We seek views on whether this should be dealt with separately from a general fraud scheme (paragraph 68).

(ii) Fraudulently inducing non-fulfilment of statutory duty (paragraph 69).

(iii) Fraudulently obtaining the grant of a licence, certificate, permission or the like (paragraph 70).

(iv) Fraudulently obtaining membership of an organisation which confers, or confers a prerequisite to, some qualification (paragraph 71).

(v) Fraudulently obtaining information (paragraphs 76-77).

(vi) Fraudulently obtaining overdraft facilities (paragraph 78).

(2) Conduct which does not need to be penalised in the context of fraud

(a) In the economic field -

(i) Taking without deception property which is excluded from property which can be stolen (paragraph 60).

(ii) Commercial practices by which loss is caused, not involving conduct which amounts to deception as defined in section 15(4) of the Theft Act 1968, or any other specific offence (paragraph 65).

(b) In the non-economic field -

(i) Fraudulently obtaining membership of a purely social organisation (paragraph 71).

(ii) Making false statements to hamper the investigation of contraventions of the law. So far as any further offences might be required in this sphere they should be considered in the context of offences relating to the administration of justice (paragraph 72).

(iii) Fraudulently obtaining entry to premises where no charge is made for entry (paragraph 73).

85. We are anxious to have views on the provisional conclusions that we have reached and upon the questions -

(a) whether any of the conduct which we have suggested should be penalised is conduct

which should not be made a criminal offence, and

(b) whether there is any conduct, whether included within paragraph 84(2) above or not, which, if conspiracy is limited to conspiracy to commit an offence, should be made criminal.

In addition, we would welcome views on our provisional proposal for embodying fraud offences in an Act separate from the Theft Act 1968 as suggested in paragraph 83.

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